

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 2 of 1987

to

FIRST APPEAL No 8 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA Sd/-

and

Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

NEW INDIA ASSURANCE CO.LTD.

Versus

JAYABEN NARANAGAR

Appearance:

MR AJAY MEHTA FOR MR RAJNI H MEHTA
for Appellant.

MR BK OZA for Respondents - claimants.

MR YS LAKHANI for Respondent No.6 - M/s.Tata Chemicals Ltd.
No one has appeared on behalf of Respondent No.7 - Despite service.

CORAM : MR.JUSTICE M.R.CALLA

and
MR.JUSTICE D.A.MEHTA

Date of decision: 23/11/2000

COMMON JUDGEMENT

(Per : MR.JUSTICE M.R.CALLA)

1. All these seven appeals are directed against the common judgment and decree dated 30.09.1986 passed by the Motor Accident Claims Tribunal (Aux.), Junagadh in Motor Accident Claim Petition Nos. 351 to 354 of 1982 and Motor Accident Claim Petitions Nos. 16, 17 and 43 of 1983. It may be mentioned that the Motor Accident Claim Petition No.352 of 1982 was also decided by the very same judgment but was disposed of without any order as the same was withdrawn unconditionally as mentioned in the body of the order itself. The above numbered Motor Accident Claim Petitions were filed under section 110A of the Motor Vehicles Act, in relation to accident which took place on 30.08.1982 at 9.00 a.m. near village Bokhira on the road between Kachhudi and Porbandar. The motor vehicle involved in this accident is a public carrier bearing registration no. 5460 owned by M/s. Tata Chemicals Limited, Mithapur and was being driven by one Mer Uga Ghela who was employed by M/s.Tata Chemicals as driver of the said vehicle. The vehicle in question was insured with New India Assurance Company Limited i.e. the appellant herein in all these seven appeals. In Claim Petitions No. 351, 352 and 354 of 1982 and Claim Petitions No. 16 and 17 of 1983 the claimants are legal representatives and dependants of the victims who died as a result of injuries sustained in the said accident whereas the claimants in Claim Petition Nos.252/82 and 42/83 are the victims as injured persons in this accident. The deceased as well as persons injured in this accident were travelling by the said motor vehicle. The claimants have come with the allegation that it was a case of rash and negligent driving of the said vehicle and on account of such rash and negligent driving the accident occurred resulting into the death in relation to five claim petitions and injuries in case of two claim petitions as above. The driver was sought to be held liable as a wrong doer. The owner was sought to be liable as the owner of the motor vehicle as also the employer of the driver and the insurance company was to indemnify its insured as insurer of the motor vehicle in question. On behalf of the claimants the amounts claimed before the Motor Accident Claims Tribunal is as under :

Claim Petition No. 351/82 Rs.1,00,000/-

Claim Petition No. 352/82 Rs.1,00,000/-

Claim Petition No. 353/82 Rs. 75,000/-
Claim Petition No. 354/82 Rs.1,00,000/-
Claim Petition No. 16/83 Rs.1,25,000/-
Claim Petition No. 17/83 Rs.1,25,000/-
Claim Petition No. 42/83 Rs.1,00,000/-

The driver and the owner filed a joint written statement seeking to traverse the claim of the claimants whereas the insurance company filed its separate written statement. The driver and the owner of the vehicle did not contest the factum of the accident nor did they dispute that the motor vehicle in question was being driven by the driver who was an employee of the owner of the vehicle. The vehicle was owned by M/s.Tata Chemicals Ltd., however, the allegation of rash and negligent driving has been denied and the amount claimed has been disputed by pleading that the claim was highly exaggerated and thus the liability has been sought to be disowned. The insurance company denied the factum of insurance in the first instance at the relevant point of time and in the alternative, it was pleaded that it was not liable because the driver was not holding any valid licence. The plea was also taken that the vehicle in question was a goods vehicle and the victims of the accident were unauthorised passengers travelling by the vehicle and therefore the insurance company was not liable to indemnify the insured. It appears that during the pendency of the claim, the Shakti Transport Company, Adityana was also impleaded as opponent no.7. It is the case of M/s.Tata Chemicals that it had given this vehicle on contract to Shakti Transport Company for carrying out its work. Shakti Transport Company also took the stand that it was working as contractor of M/s.Tata Chemicals and that it was carrying the labourers of M/s.Tata Chemicals by the said motor vehicle for the work of M/s.Tata Chemicals. On this aspect it was contended by Shakti Transport Company that as the accident had occurred while working as contractor of M/s.Tata Chemicals it was not liable to pay any amount by way of compensation. In the alternative, it was pleaded that the insurance company being the insurer of the vehicle M/s.Tata Chemicals was liable to indemnify.

2. On the basis of the pleadings of the parties the issues were framed as under and the answers were recorded by the Motor Accident Claims Tribunal as mentioned against each of the issues to the following effect :

1 Whether the Yes in all the petitions.
petitioner/s proves/

prove that he/they sustained injuries or that the deceased died due to injuries sustained by him/her because of rash and negligent driving by opp.no.1 ?

2. Whether petitioner/s Yes. Except in petition is/are entitled to no.350/82. claim compensation ?

If yes, what amount and (a) Nil. In petition from whom ? No.350/82.

(b) Rs.50,000/- from opps. nos.1 to 4 jointly and severally in petition no. 351/82.

(c) Rs.1,00,000/- from opps. nos. 1 to 4 jointly and severally in petition no. 352/82.

(d) Rs.29,601/- from opps. nos. 1 to 4 jointly and severally in petition no. 353/82.

(e) Rs.50,000/- from opps. nos. 1 to 4 jointly and severally in petition no.354/82.

(f) Rs.1,00,000/- from opps. nos. 1 to 4 jointly and severally in petition no.16/83.

(g) Rs.1,00,000/- from opps. nos. 1 to 4 jointly and severally in petition no. 17/83.

(h) Rs.55,360/-from opps.

nos. 1 to 4 jointly
and severally in
petition no.42/83.

3 What award ? As per award below.

3. The order was passed accordingly as mentioned in the body of the impugned order under the heading of each one of the claim petitions. The insurance company has come in appeal before this Court under section 110D of the Motor Vehicles Act. On behalf of the insurance company - the appellant in each of these appeals it has been argued by Mr.A.R.Mehta that the vehicle in question was admittedly a goods vehicle and the deceased as well as victims of this accident were unauthorised passengers in the said vehicle and according to latest decision rendered by the Supreme Court in case of Mallawwa Vs. Oriental Insurance Company Ltd.,AIR 1999 SC 589, the insurance company cannot be held to be liable for the death or the injuries sustained by the unauthorised passengers in a goods vehicle. In the aforesaid decision, after considering the provisions of section 95 of the Motor Vehicles Act and the liability of the insured thereunder, the Supreme Court has held in para 10 of the judgement that ordinarily the vehicle in question could be regarded as a vehicle carrying passengers, if the vehicle was of that class. Keeping in mind the classification of vehicles under the Act, the requirement of registration with particulars including the class to which it belonged, requirement of obtaining a permit for using the vehicle for different purposes and compulsory coverage of insurance risk, it would not be proper to consider a goods vehicle as a passenger vehicle on the basis of a single use or use on some stray occasion of that vehicle for carrying passengers for hire or reward. For the purpose of construing a provision like proviso (ii) to Section 95(1)(b), the correct test to determine whether a passenger was carried for hire or reward would be whether there has been systematic carrying of passengers. Only if the vehicle is so used then that vehicle can be said to be a vehicle in which passengers are carried for hire or reward. Thus to find out whether an insurer would be liable to indemnify an owner of a goods vehicle in a case of the present nature the mere fact that the passenger was carried for hire or reward would not be enough and it shall have to be found out as to whether he was the owner of the goods or an employee of such an owner, and then whether there were more than six persons in all in the goods vehicle and whether the goods vehicle was being habitually used to carry passengers. The position would thus become very uncertain and would vary from case to

case. Production of such result would not be conducive to the advancement of the object sought to be achieved by requiring a compulsory insurance policy. Mr.Mehta has therefore submitted that in no case the insurance company can be held to be liable to indemnify the claimants in the facts of the present case and the Tribunal has committed an error in holding that all the opponents including the insurance company were jointly and severally liable to pay the compensation to the claimants.

4. Except the insurance company no other party i.e. neither the driver nor the owner nor the contractor company has come in appeal. Mr.B.K.Oza, appearing on behalf of the claimants has submitted that even if the insurance company is not held to be liable he is entitled to compensation from the owner and the driver as also the contractor company as they are jointly and severally liable to pay the compensation. On behalf of the owner i.e. M/s.Tata Chemicals Ltd. Mr.Lakhani has argued before us that deceased and victims of this accident were labourers of M/s. Tata Chemicals and they were being taken for the work. The said vehicle belonged to Tata Chemicals and therefore the insurance company was liable. He has made reference to the document exhibit 64 i.e. policy issued by the insurance company and has pointed out that in this policy in the column of schedule of premium apart from the driver and cleaner four coolies have also been mentioned and therefore, at least for four persons the insurance company has to be held to be liable to indemnify. We called upon Mr. Y.S.Lakhani to show in the first instance as to whether any plea was taken by M/s.Tata Chemicals as owner in the claim petition, that the persons who died in accident or who sustained injuries were its employees and that they were being taken for the work as employees or labourers of the company. He failed to show any such thing from the peladings and we find that no such plea whatsoever was taken in the joint written statement which was filed by the driver and the owner. Mr.Lakhani then referred to the statement which was made by one Giga Parbat at exhibit 87 who was examined as 'mukadam'. A perusal of exhibit 87 i.e. deposition of this witness Giga Parbat would show that he had 50 bigas of land. He stated that while working as 'mukadam' in Tata Chemicals he had taken 'kadias' and labourers for Tata Company and whereas the driver was driving the vehicle in full speed the vehicle turtled on the turn. He has stated that he has no pay slips (to show that he was employed with Tata Chemicals) but he used to engage the labourers and take them for the work of Tata Chemicals. He has also stated that in the said vehicle at the time of the said accident besides him there were five other labourers and he was travelling in the vehicle as 'mukadam'

as an employee of Tata Chemicals. However, we find that neither this witness produced any documents to prove his employment with Tata Chemicals nor Tata Chemicals has produced any document to show that this witness was an employee of Tata Chemicals, nor any evidence had been led that the deceased or injured were in the employment of Tata Chemicals. Mr.Y.S.Lakhani has submitted that the deceased or injured in these claim petitions were not the owners of the goods and were carried in the goods vehicle as such which met with the accident nor they were travelling in the vehicle as passengers on payment of fare nor any of them was gratuitous passenger but they were employees of Tata Chemicals, and therefore, what has been laid down in the Mallawwa's case (Supra) cannot be invoked so as to absolve the insurance company from indemnifying the claim in this case. Mr.Y.S.Lakhani has placed reliance on a Full Bench decision of this Court in the case of New India Assurance Company Ltd. Vs. Nathiben Chatrabhuj reported in 1982(1) GLR Pg.411. Mr.Lakhani has submitted that in this case it has been held that the risk in respect of owner or hirer or bonafide employees of such owner or hirer carried in goods vehicle free of charge are also covered by the statutory policy. While citing yet another decision of the Division Bench of this Court in the case of Husseinbhai Ahmedbhai Memon Vs. Mangiben wd/o Lallubhai Holibhai Chaudhari reported in 1984(1) GLR Pg.221, it has been submitted that out of labourers engaged for loading and unloading of goods by owner of truck and who were sitting in truck, one labourer died and another was injured, the truck was insured, policy was under the Act, claim objection was filed by dependants of the deceased as well as injured labourer and the Court held that the insurance company cannot be absolved from statutory liability. Mr.Y.S.Lakhani also placed reliance on the case of National Insurance Co. Vs. Punabhai Zerabhai Koli, reported in 1985 G.L.H. 786, wherein the Court held that there was no total restriction on carrying more than six or seven bona-fide employees in goods vehicles. By virtue of clause I.M.T. 16 of the insurance policy, the insurer is liable to indemnify the insured in respect of all the employees who have met with the accident and who suffered injuries and there is no reason to restrict the coverage of insurance to six bona-fide employees only.

5. In our opinion these decisions are of no avail to the owner in the facts of the present case for the simple reason that no factual foundation whatsoever was led by the owner M/s.Tata Chemicals in its pleadings nor it can be said to have been proved in the facts of the present case by way of evidence that the deceased or injured persons in this accident were in the employment of M/s.Tata Chemicals. Even if it is taken that the persons who were carried were

labourers, it is very clear from the evidence of Giga Parbat i.e. 'mukadam' that he used to retain the labourers and carry them for the work of M/s. Tata Chemicals. Merely because certain labourers are picked up by someone (Not even an employee) other than the owner of the vehicle for a work as and when the exigency arises, it cannot be said that they are in the employment of the company for whose work they are taken. The respondent M/s. Tata Chemicals has not produced any evidence of cotemporaneous nature to prove the employment of any of these persons including the so called 'Mukadam' with it. It was attempted by Mr.Y.S.Lakhani that they were casual labourers but for that purpose also no evidence has been led, no muster roll or register of the company has been produced. It can't be disputed that the companies like Tata Chemicals are required to keep records of all the labourers who are engaged or employed by such companies for the purposes of the works which are carried out by it and no labourer including the casual labourer is supposed to be utilised without maintaining proper records. Such records are required to be maintained but no such record has been produced before the Tribunal. Thus, neither there was any pleading nor it has been proved that the deceased and the injured victims in this case were in employment of M/s. Tata Chemicals. The mention of four coolies in the insurance policy in the heading of the column of schedule of the premium does not advance the case of the owner in this regard so as to fasten the liability upon the insurance company for the simple reason that at no stage it was the case of the company that there was any coolie in the said vehicle or that any of these person was employed as coolie. No material whatsoever has come on record to prove these persons as coolies and merely because the Courts while deciding the cases of MAC Petitions have held that the insurance company has to indemnify the employees for labour work engaged by the company, it cannot be held that in the instant case deceased and the injured persons were employees nor they can be deemed to be the employees of M/s. Tata Chemicals as was sought to be argued.

6. We therefore have no hesitation in holding that in view of the law laid down by the Supreme Court in Mallawwa's case (Supra), so far as the deceased and victims in this accident are concerned they cannot be held to be the employees of M/s.Tata Chemicals Ltd. and insurance company cannot be held to be liable to indemnify for them and in the facts of the present case the appellant insurance company must be absolved and cannot be held to be liable for the same and to that extent the judgement and decree passed by Motor Accident Claims Tribunal deserves to be modified.

7. The judgment and decree awarding compensation is maintained as it is with the modification that the appellant insurance company stands absolved from the liability and therefore the respondents to the claim other than the insurance company the appellant herein are only found to be liable to indemnify the claim in this case jointly and severally.

8. Mr.A.R.Mehta for the insurance company has submitted that the insurance company had deposited the amount as ordered by this Court in its interim order in these matters and the rest of the amount has been deposited in fixed deposit and such fixed deposits continue. Therefore, keeping in view the fact that the claimants have already waited for a long for their dues, we hereby direct that : -

(i) it will be open for the claimants of all the seven petitions to withdraw the due amount as ordered by the Tribunal from the total deposits already made by the insurance company as stated above with interest accrued thereon,

(ii) the amount as ordered by the Tribunal in all the seven claim petitions, as has been deposited and is paid and received by the claimants in all these matters out of the deposits made by the insurance company as above shall be reimbursed and made good directly to the appellant insurance company by the insured i.e. M/s.Tata Chemicals etc.,as mentioned in para 7,

(iii) Mr.Y.S.Lakhani, appearing for M/s.Tata Chemicals has submitted that three months time be granted to respondent M/s.Tata Chemicals for making payment of the entire amount under the Tribunal's order including interest, to the appellant insurance company. We order accordingly.

9. In the result, all these seven appeals are partly allowed as above and the decree stands modified accordingly and be drawn as such. In the facts and circumstances of the case no order as to costs. Interim orders passed in Civil Applications in all these matters shall cease to be operative forthwith.

10. Mr.A.R.Mehta appearing on behalf of the appellant insurance company apprehends that such arrangement may be used as a precedent against insurance company in various cases. The apprehension is wholly unfounded. It is made clear that we have given the above directions keeping in view the interest of the claimants who have been made to wait for a long period and also keeping in view the fact that part of the amount has already been withdrawn by the claimants and the claimants have also withdrawn the amount of interest accrued on the deposits made by the insurance company. It is open for the Court to mould the relief in the facts of a given case so as to put an end to injustice and evolve a feasible arrangement depending of the facts and circumstances of each case.

11. Records and proceedings be returned to the concerned Tribunal forthwith.

Sd/- Sd/-

(M.R.Calla, J) (D.A.Mehta,J)

m.m.bhatt